

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ARY Jewelers, LLC.,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 04:-CV-10281 EFE
)	
IBJTC Business Credit Corp. and)	AFFIDAVIT OF BARRY PICKENS
David Molinaro,)	
Defendants.)	

BARRY PICKENS, being sworn, deposes and states as follows:

1. I submit this affidavit at the request of Plaintiff's attorney in support of Plaintiff's response to Defendants' Motion for Summary Judgment

2. I have been retained by Plaintiff, ARY Jewelers, LLC ("Plaintiff") in the above captioned case, to render opinions regarding the damages Defendants' conduct has caused, including attorney's fees incurred by Plaintiff in multiple lawsuits because of Defendants' conduct, and regarding the reasonableness and necessity of those fees.

3. I received a bachelor of arts degree from the University of Kansas in 1989. I received my juris doctorate degree from the University of Texas in 1992.

4. Since October, 1992, I have been licensed to practice law in the State of Missouri and have been, since May, 1993, licensed to practice law in the State of Kansas. I am, and have been at all times since being licensed, an attorney in good standing in both states.

5. Prior to the transfer of this case from the Western District of Missouri to this Court, I was co-counsel of record for Plaintiff.

6. I was one of the counsel for Plaintiff in each of the lawsuits caused

Defendants' conduct discussed below. Accordingly, I have personal knowledge regarding each of those lawsuits.

7. In reaching the opinions expressed in this affidavit and the report, which has been previously provided, I relied upon that personal knowledge, the pleadings, orders, judgments, and appellate decisions in those lawsuits, and the invoices for attorney's fees and costs referred to below.

8. Defendants' conduct prevented Plaintiff from obtaining the financing that Plaintiff needed in order to acquire the stock of Krigel's, Inc. out of a pre-packaged bankruptcy that Plaintiff had negotiated with the owners of Krigel's, Inc. as part of their Stock Purchase Agreement. As a direct result, numerous parties filed lawsuits against Plaintiff, including the following:

a. As debtor in possession in the bankruptcy action it had filed, Krigel's, Inc., initiated an adversary proceeding against Plaintiff alleging, *inter alia*, that Plaintiff should be ordered to pay its creditors the full amount Krigel's, Inc. owed those creditors at the time of filing of its bankruptcy petition, or approximately \$10 million. That adversary proceeding was filed in the *In re Krigel's, Inc.* bankruptcy action, W.D.Mo. Bankr. Court Case No. 01-40276, and the adversary proceeding was captioned *Krigel's, Inc. v. ARY Jewelers, LLC, V. J WV*, and the adversary proceeding was captioned *Krigel's, Inc. v. ARY Jewelers, LLC, V. J WV*. Mo. Bankr. Adversary Proceeding No. 01-4089. The bankruptcy court ultimately abstained from dismissing that adversary proceeding;

b. After the Bankruptcy Court abstained, some of the largest creditors of Krigel's, Inc., including the lead plaintiff in that case, M. Fabrikant & Sons, Inc., filed a separate federal diversity jurisdiction lawsuit against Plaintiff alleging, *inter alia*, a similar claim

Plaintiff should be ordered to pay the Krigel's, Inc. creditors the full amount Krigel's, Inc. owed them. That lawsuit was captioned *M. Fabrikant & Sons, Inc., et al. v. ARY Jewelers, LLC*, Vol. 1, Mo. Case No. 01-0671-CV-W-5.

9. In addition, Plaintiff had deposited \$1.5 million into two escrow accounts pursuant to the terms of the Stock Purchase Agreement. As another direct result of Defendant's conduct, the owner of the Krigel's, Inc. stock, Scott Krigel, in both his personal capacity and as the trustee of his trust, directed the escrow agent to pay over the escrowed funds to him based on Plaintiff's alleged breach of that agreement. Plaintiff contested the directions to pay the escrowed funds to Scott Krigel, and filed a lawsuit to seek an order of the court directing the escrow agent to return the contested escrow funds, as Plaintiff was required to do to receive the escrowed funds pursuant to the terms of the escrow agreements. That lawsuit was captioned *ARY Jewelers, LLC v. Scott Krigel, et al.*, Johnson County, Kansas District Court Case No. 01-02633.

10. Both parties to that lawsuit filed cross-motions for summary judgment. The Johnson County District Court granted summary judgment in favor of Plaintiff and against the defendants therein, and directed the escrow agent to return the escrowed funds to Plaintiff. The defendants in that lawsuit filed an appeal from that judgment to the Kansas Court of Appeals. The Kansas Supreme Court later directed that the intermediate appellate court transfer that appeal to it. That appeal was captioned *ARY Jewelers, LLC v. Scott Krigel, et al.*, Kansas Supreme Court Appeal No. 02-88991-A. The Kansas Supreme Court affirmed the judgment in favor of Plaintiff and against defendants.

11. Prior to the defendant's appeal, Plaintiff filed a post-judgment motion to award

the judgment to add awards of pre- and post-judgment interest. The Court denied Plaintiff's motion. Plaintiff filed an appeal from that order to the intermediate appellate court. The Kansas Supreme Court also ordered transfer of that appeal to it, and then reversed the order denying the award of interest and directed the District Court to enter interest awards against defendants. That appeal was captioned *ARY Jewelers, LLC v. Scott Krigel, et al.*, Kansas Supreme Court Appeal No. 02-89543-A. Upon remand, the parties litigated the amount of the interest due Plaintiff in Johnson County District Court Case No. 01 CV 02633, and the Court entered an award in favor of Plaintiff.

12. It is my opinion that Defendant's conduct caused Plaintiff to incur the attorney's fees set forth on the relevant fee invoices set forth below. Based on Defendants' conduct, Plaintiff was unable to secure adequate financing to purchase the Krigel's, Inc. stock and could not complete the transaction in the manner it anticipated and that it would have been able to do but for Defendants' conduct. Because it could not complete the transaction in the manner it anticipated, and would have had to self-finance to complete that transaction, Plaintiff did not close on the Stock Purchase Agreement and asserted that its performance was excused based on the financing condition in that agreement.

13. As set forth above, Krigel's, Inc., its stockholders, and its creditors disagreed with Plaintiff's contention that its performance was excused by its inability to obtain financing. Also set forth above, those parties filed the aforementioned lawsuits seeking damages from Plaintiff in excess of \$10,000,000. In addition, Scott Krigel gave the escrow agent instruction to pay him the \$1.5 million in escrow.

14. When it was unable to obtain adequate financing to complete its acquisition of

stock of Krigel's, Inc. and thus refused to close the Stock Purchase Agreement, Plaintiff engaged two law firms to protect its interests: Watt, Beckworth & Carrigan, L.L.P. of Houston, Texas (attorneys John B. Beckworth and Joseph G. Thompson); and Spencer Fane Britt & Browne LLP of Kansas City, Missouri (attorneys Scott J. Goldstein, Lisa A. Epps, Barry L. Pickens and Michael C. Leitch).

15. Those two law firms jointly coordinated the defense of the lawsuits referenced in paragraph 8(a) & (b) above, and coordinated the filing of the lawsuit referenced in paragraph 8(b) above. Once the lawsuits against Plaintiff were dismissed, the Spencer Fane Britt & Browne LLP law firm represented Plaintiff in its prosecution of the Kansas state court lawsuit and appeals therein.

16. Both law firms submitted monthly, itemized billing statements for their time and expenses in those lawsuits to Plaintiff. Plaintiff seeks an award of damages in this case to compensate for the fees and expenses it incurred in the referenced lawsuits. The portions of these invoices that set out those fees and expenses are attached hereto as Exhibit 1 and are incorporated by this reference. The Watt, Beckworth & Carrigan, L.L.P. invoices bear Billing Statement Nos. ARY 02986 – ARY 03030; and the Spencer Fane Britt & Browne LLP invoices bear Billing Statement Nos. ARY 03031 – ARY 03282.

17. The relevant fees and expenses set forth on these invoices were reasonable and the work for which those fees were charged was necessary.

18. The hourly rates charged by the attorneys at these two firms were reasonable and customary for the Kansas City metropolitan market, and the Watt, Beckworth & Carrigan, L.L.P. rates are reasonable for the Houston, Texas market, where Plaintiff retained that firm.

19. The attorneys in both firms reasonably coordinated their efforts to avoid unnecessary duplication of work.

20. My opinion that the fees and expenses at issue in this case were reasonable is based upon the following factors customarily considered in determining the reasonableness of attorney's fees:

a. The time and labor required on this case were significant; the questions involved were novel and difficult; and the lawyers needed a high degree of skill to perform legal services properly.

b. Because the case required the Houston lawyers to work on the case at a location which is distant from their regular office, it is likely that the representation precluded opportunity for some other work.

c. The amount at issue in each of these lawsuits was significant. Each of the lawsuits against Plaintiff could have resulted in judgments in excess of \$10,000,000. The Kar state court lawsuit filed by Plaintiff against *inter alia* Scott Krigel involved \$1.5 million in escrowed funds plus another approximately \$300,000 in interest or earnings. In each of the lawsuits, the law firms achieved results favorable to Plaintiff, including the dismissal of both federal lawsuits against Plaintiff and a summary judgment in favor of Plaintiff in the state court lawsuit.

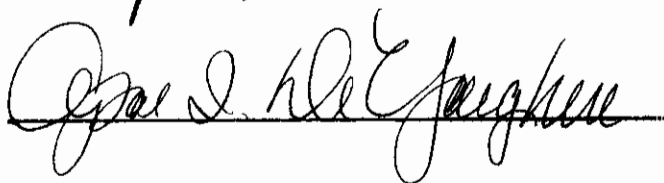
21. All of the documents and information I relied upon are of the type reasonably relied upon by experts in this particular field (damages analysis) in forming opinions and inferences upon the subjects/opinions expressed herein. All exhibits attached hereto are true and correct copies.

22. The Spencer Fane Britt & Browne LLP invoices (Bates Nos. ARY 03031 – A 03282) and attached hereto as Exhibit 1 are kept by Spencer Fane Britt & Browne LLP in regular course of its business. As a partner in the firm of Spencer Fane Britt & Browne LLP, I am familiar with the billing procedures and records for the firm. It was the regular course of business for an employee or representative of Spencer Fane Britt & Browne LLP with knowledge of the act, event, condition, or opinion recorded to prepare invoices such as the invoices attached hereto as Exhibit 1 and to make a business record, the invoices, or to transmit information thereof to be included in such invoices. The invoices attached hereto as Exhibit 1 were made on or near the time of the act, event, condition, or opinions recorded therein, or reasonably soon thereafter. The invoices attached hereto as Exhibit 1 are an original or exact duplicate of the original.



Barry Pickens

Sworn to before me on this the 12th day of September 2005.



Notary seal:

OPAL I. DeYAGHERE
Notary Public - Notary Seal
STATE OF MISSOURI
Clay County
My Commission Expires: January 9, 2008